GFS Building Maintenance, Inc. *and* Service Employees International Union, Local 531, AFL–CIO. Case 34–CA–7864

February 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 2, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, GFS Building Maintenance, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Margaret Lareau, *Esq.* and *Thomas Quiqley*, *Esq.,* for the General Counsel.

Mark Bourbeau, *Esq.* and *Liam Flloyd, Esq.,* of Boston, Massachusetts, for the Respondent.

Barbara Collins, *Esq*., of Hartford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on December 15 and 16, 1997. The charge was filed by Service Employees International Union, Local 531, AFL–CIO (the Union) on May 15 and an amended charge was filed on August 13, 1997.[1] The complaint was issued September 9. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

GFS Building Maintenance, Inc. (GFS or Respondent), a corporation, engages in the furnishing of cleaning services for commercial buildings. It maintains its principal office in Nashua, New Hampshire, and performs services at a number of locations in that State, and as pertinent to this proceeding, provides cleaning services at 10 Columbus Boulevard, Hartford Square North, Hartford, Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

GFS operates a commercial cleaning service, primarily in New Hampshire. It is a nonunion company and in its operations in New Hampshire it exists in an environment that is union free. At a number of locations in New Hampshire, GFS provides cleaning services for CP Management (CP), which manages the locations. In 1997, the ownership of a building in Hartford, Connecticut, named Hartford Square North passed to a company which uses CP. CP canceled the contracts of the existing providers of services to the building, including its cleaning contractor. The janitorial employees of this contractor, Capitol Cleaning, are represented by the Union.[2] Capitol Cleaning is a member of a group of cleaning contractors who have a collective-bargaining agreement with the Union, which represents the janitorial employees of all cleaning contractors of major commercial buildings in Hartford.

To staff the cleaning crew to be assigned to Hartford Square North, GFS was directed by CP to use Hartford area janitorial employees rather than send a crew of employees from New Hampshire. GFS placed ads in the Hartford newspaper for employees, giving an 800 number for a response. It received a number of calls from job applicants and in mid-March held interviews and extended offers to about 12 to 14 applicants. It began operations on March 31, the date the previous contractor's employees learned their jobs had been terminated.

On that date, the Union's secretary-treasurer, Kevin Brown, two other union officials, and the terminated employees of Capitol Cleaning confronted Lisa Bourbeau, the president of GFS, at the site. Brown requested that she hire the terminated employees, as called for under the union collective-bargaining agreement with cleaning contractors in Hartford. She declined and the Union demanded job applications. GFS directed the Union call its 800 number and it did. After a 2-week delay, GFS told the Union that anyone wanting an application would have to write individually requesting one. The Union had its member-employees write the Respondent requesting application form in mid-April. In late May, GFS sent the application forms to those requesting them. The affected employees sent these back to GFS in mid-July. Since receipt of the forms, GFS has not hired any of the applicants though it has hired several new employees in Hartford since that date. In these circum-

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Hurtgen agrees with his colleagues and the judge that the Respondent did not violate Sec. 8(a)(1) by failing to hire the predecessor's employees. Because he agrees that the Respondent established that it would not have hired the predecessor's employees, regardless of any union considerations, Member Hurtgen does not pass on the judge's finding of antiunion animus.

[1] All dates are in 1997 unless otherwise indicated.

[2] The bargaining unit is described thusly: All occupational classifications of building service employees employed by the Employer, in Hartford . . . and in Hartford County outside the city of Hartford, excluding industrial, hospital and retail facilities.

stances, the complaint alleges that GFS was a successor to Capitol Cleaning and further alleges that it was obligated to hire the replaced contractor's employees and extend recognition to the Union. It further alleges that certain unilateral changes it made in the wages and working conditions of the employees at Hartford Square North were unlawful as the Union was not afforded notice and the opportunity to bargain. For its part Respondent contends that it is not a successor and it had no duty to initially hire the replaced employees and that its long established hiring practices make their failure to thereafter consider the replaced employees for hiring lawful.

B. The History of the Change in Cleaning Contractors at Hartford Square North

Hartford Square North is a commercial building with about 260,000 square feet of space. In the beginning of 1997, about 100,000 square feet of this space was vacant. Beginning in 1992, Capitol Cleaning, a Hartford area cleaning contractor, secured a contract from a management company named J and S to clean this building. At some subsequent time, the management of this property became the job of Koll Management Services Inc. (Koll), which kept Capitol as the building's cleaning service. For the entire time that Capitol was under contract to clean the building, its cleaning employees were represented by the Union.[3] The Union represents the employees of most, if not all of the companies providing cleaning services for commercial buildings in Hartford.

At Hartford Square North, Capital performed a complete janitorial service, 5 nights a week. The service involved dusting, vacuuming, emptying trash, cleaning restrooms, and cleaning tenant and public areas of the building. The details of the cleaning service it was required to provide were set forth in its contract with Koll and in the leases of the building's tenants. At the end of March 1997, Capitol had 12 employees working on regular basis in the building and it was cleaning about 165,000 feet of the building.

In 1996, an investment group called Pacific Northwest Mortgage Investors, L.L.C. with The Wilkinson Group as manager, became interested in purchasing Hartford Square North. It already owned a smaller building across the street named Hartford Square West. The Wilkinson Group utilized the management services of CP Management. In turn, CP regularly used the services of GFS for some properties it managed in New Hampshire.

GFS had in the past cleaned buildings managed by CP in New Hampshire. In January 1996, CP asked if GFS would be interested in cleaning Hartford Square West in Hartford. This building was only 60,000 square feet, a size too small for GFS to profitably service. In October 1996, CP again contacted GFS and asked that they study the floor plans of Hartford Square North, which was being acquired by one of their clients, the Wilkinson Group. GFS was asked to give a cost proposal for cleaning that could be used in securing financing for the purchase. GFS provided the estimate. Thereafter, CP notified GFS that the sale was going through and arranged for GFS's president, Lisa Bourbeau, to have a tour of Hartford Square North and West. The plan was for GFS to clean both buildings if the sale was finalized.

[3] Capital also has some nonunion operations including window and carpet cleaning services.

The tour of Hartford Square North was conducted by Dave Jacobs, who was then employed by Koll as the building manager for the building. According to Bourbeau, during the tour Jacobs noted that the cleaning contractor at Hartford Square North was unionized and he asked if she had any experience with unions and she said no. She also told him that she had no cleaning contracts in cities where the cleaning contractors were unionized.[4] Jacobs then said it was not like anything she had experienced. He said she could not do what she wanted, that the unions had Hartford sewn up. He warned her that if she came into the building as a nonunion contractor, she could expect the Union to picket and do whatever it could to get her out. He also said that his management company did not intend to give up managing the building and that he had no intention of replacing Capitol. For this reason, he gave her an abbreviated tour of the building and refused to give her the cleaning specifications for the building. She then met with a CP representative and toured Hartford Square West. She told this representative of her meeting with Jacobs and he said he would relate it to his client. He also said for her to plan on providing the cleaning services for the buildings. This conversation took place in late January or early February.

During the last of 1996 and until Koll's departure from Hartford Square North at the end of February, when the sale to the Wilkinson Group was finalized, Jacobs was in regular contact with CP.[5] Jacobs let CP bring in engineers to view the building and let it use some vacant space to conduct interviews. He learned that CP had an existing relationship with GFS. Jacobs testified that prior to the end of February, he told Bob Symolon, the president of Capitol Cleaning, that he understood that Capitol Cleaning was to be replaced by a nonunion company.

Symolon was given written notice on February 27; notice that Capitol Cleaning's contract for Hartford Square North was to be terminated from the Wilkinson Group. The Wilkinson Group terminated Koll as manager of the building on that date and replaced Koll with CP. Symolon got final notice of the termination of his contract when he was faxed a termination notice from CP on March 31.[6] In the third week of March, Symolon called Marty Schwager, a CP official. According to Symolon, he asked what his chances were to stay on at the building and continue to provide cleaning. He mentioned to Schwager that he had heard that CP was thinking of hiring a nonunion cleaning company, noting that all the downtown Hartford buildings were cleaned by union companies. According to Symolon, he was given encouragement by Schwager with regard to his chances of being retained.

Symolon did not tell his employees that the contract was being terminated. He did contact the Union's secretary-treasurer, Kevin Brown, during the first week of March to inform him of

[4] Under the collective-bargaining agreement between the Union and cleaning contractors in Hartford, when one contractor is replaced by another at a given building, the new contractor must hire the site employees of the contractor being replaced. Bourbeau testified that she was not told this by Jacobs and that she first learned this from an encounter on March 31, with Kevin Brown, secretary-treasurer of the Union. I credit this testimony.

[5] Koll was not allowed to bid on the contract for managing the building for the Wilkinson Group.

[6] CP had intended to terminate Capitol Cleaning as of February 27, but overlooked a contract requirement that 30 days' notice must be given prior to termination. Thus, Capitol Cleaning received a 30-day reprieve.

the termination letter. Capitol Cleaning had never cleaned Hartford Square West. On March 27, Symolon had another conversation with Brown in which he expressed some optimism that his company might stay on at Hartford Square North. This was based on the conversation he had had with Schwager, in which he had been told that there may be a bidding process for the contract.

Kevin Brown testified that there were about 20 tenants in the building when Capitol was the cleaning contractor. The Union became the representative of the cleaning employees at the building in 1991 when the Union was recognized by the then cleaning contractor, Unico Cleaning Services. When Capital took over the contract in 1992, it hired all the janitorial employees working at the building. The cleaning employees at Hartford Square North under Capital usually worked from 4 to 6 hours a night, 5 nights a week.

Brown testified that he first learned of the change in ownership of the building sometime around the first of March. He learned that Capitol Cleaning no longer had the cleaning contract on March 31, when Symolon informed him of this fact. On March 27, Symolon had told him that there might be a change, but that he was trying to work it out. Also during March, Brown spoke with Schwager of CP. Schwager told him all contracts in the building had been canceled. Brown asked if he wanted a list of union cleaning contractors and Schwager said he did. Brown sent such a list to him. Schwager did not tell him he was considering using a nonunion cleaning company.

C. GFS Hires Employees and Begins Cleaning Hartford Square North

During late January or early February, Bourbeau was informed that GFS would be the cleaning contractor for Hartford Square North. Shortly thereafter, Bourbeau was informed by CP that the cleaning was to be done by Hartford residents because the city's economy was depressed. In previous instances where she began cleaning a building, she initially started with a core group of her existing employees. CP would not allow this practice at Hartford Square North; therefore Bourbeau was forced to hire employees in Hartford. Bourbeau testified that she did not ever consider hiring the existing janitors at Hartford Square North as she considered hiring away another contractor's employees to be unethical. She testified that the only times that she had done so were when this was a requirement for obtaining a contract. She was also told that cleaning was to begin at the first of March. Bourbeau had GFS Account Executive Ed Farrington place ads in the Hartford newspaper for full-time and par-time cleaners and experienced floor cleaners. These ads, which ran in the editions of February 19, 20, and 23, read: "JANITORIAL Seeking FT/PT Cleaners and exp'd Floor Person, GFS Building Maint. 800–852–6200."[7] In response to the ad, GFS received about 40 to 60 phone calls from prospective job applicants. They took information from these people and told them the locations that would be involved. Shortly after the group of prospective applicants was known, CP informed GFS that its service would not be needed until the end of March because of the failure to give a contractually required 30-day notice for termination of Capitol Cleaning's contract.

Because of the delay in startup, the job interviews of the prospective applicants were postponed until mid-March. The interviews were held in space provided by CP to GFS in the Hartford Square West building. This was furnished space that CP had vacated when it moved to Hartford Square North. Bourbeau stated that they did not interview prospective employees in Hartford Square North because of insurance concerns. She testified that CP maintained insurance on the space it made available for the interviews. The interviews were conducted by Farrington and he hired a number of the applicants.[8] Following the interviews, orientation was held for the new employees on March 29 at Hartford Square North. At this orientation, a new employee brought a friend who was also hired.

D. The Union Demands Recognition and GFS Refuses

During Kevin Brown's conversation with Symolon on March 31, Symolon told him that the affected janitorial employees had not been told of the change and that they would be showing up for work. Brown then went to the building with two other union representatives to meet the employees and break the news to them. When the employees arrived, Brown told them they had been replaced and that a nonunion company had taken over the cleaning contract. He had security contact Lisa Bourbeau in order to get job applications from her. Bourbeau met Brown in the lobby and he told her that the job had been a union job and that in the Hartford area, when contractors change, they hire the employees who had been cleaning the involved property. According to Brown, Bourbeau explained that she had placed an ad in the local newspaper for janitors, had conducted interviews, and hired new employees. According to Brown, she also told him that she might need employees for a job she was getting at another building, but that the owner of Hartford Square North did not want a union in the building. She explained that in New Hampshire, when she lost a contract, she found work for the displaced employees at another job. She noted that GFS had not laid off an employee in the Company's 30-year history. Brown again asked for applications and she said she would get them to him the next day. She gave him the Company's New Hampshire phone number and said that after he had called there, she would be back in touch with him. Bourbeau also told him the wages she was paying, which were less than the wages the Capital employees had been making. She added that there was no pension and limited health benefits.

Bourbeau testified about the meeting with Brown and the displaced janitors. According to Bourbeau, he told her he was with the Capitol Cleaning janitors who just learned that they had lost their jobs. Bourbeau asked why they were not shifted to other jobs, noting that she would not abandon her employees. Brown asked her to hire the displaced janitors and Bourbeau said she had already hired a complete staff. Brown suggested she fire the employees she had hired and she declined. Brown then demanded job applications and Bourbeau said she did not have any with her. She gave him the Company's headquarters' phone number and told him to call to get application forms. Bourbeau testified that the meeting was confrontational and intimidating.

The following day, Brown called Respondent's New Hampshire office and spoke with a secretary. Bourbeau called back shortly thereafter. Brown reiterated his desire to have Bourbeau hire the Capital employees. Bourbeau told him that if she had to pay the union wages, she would lose the Hartford contract.

[7] GFS placed in evidence a number of ads placed by other cleaning companies. As was the case with GFS's ads, these did not name the location for which employment applicants were needed.

[8] One of the applicants was named Ray Chrzastek and was then a current employee of Capitol. GFS attempted to hire him as a supervisor and he initially accepted, but turned down the job before it began.

Brown suggested that she reduce the level of service to keep costs down so she could pay union wages. Brown then said he would fax a list of the employees who had been displaced. According to Brown, Bourbeau said she would send him application forms for the displaced employees to file. On April 1, not having gotten the applications the Union sent a letter requesting the forms. On April 7, the Union received a letter from GFS saying that the janitors who wanted an application should individually request one. In mid-April, the Union met with the involved janitors and they signed form letters requesting applications. These were then mailed to GFS. Subsequently, the displaced employees received the application forms which were filled out and returned to GFS. None of these janitors had been hired by GFS to date of hearing.

Bourbeau also testified about this telephone conversation with Brown and her subsequent actions. In the conversation, she told him what she was paying the employees and he told her the union rate. She explained she could not pay that rate because of her price commitment to CP. He suggested she raise her wages and cut service to meet the commitment. She explained that she also had a service commitment. Brown then accused her of union busting, noting he could not let her get away with it.

Bourbeau testified that for a period beginning March 31 she worked continuously at Hartford Square North, training the employees and learning the requirements for cleaning the building, working from 11 to 4 a.m. In mid-April, GFS received the packet of application requests from displaced janitors. She opened the packet in mid-May, having not dealt with any mail to that point. She had a GFS employee send application forms to the persons requesting them.[9] In early July, GFS received back completed application forms. Since the original hiring process, she has no job openings that have not been filled through the Company's internal referral process.[10]

GFS began cleaning Hartford Square North with 14 employees. The number of employees working there has ranged from 11 to 14 to date. Since the startup date, GFS has hired replacement employees for employees who quit or were terminated. It hired 1 at the end of March, 13 in April, 5 in June, 2 in August, 2 in September, 6 in October, 3 in November, and 1 in December. All of these employees were referred by other employees and none filled out employment applications. According to Bourbeau, all of these employees had prior cleaning experience. Starting employees are paid $7 per hour and those employees who perform well are raised to $7.50 per hour. Only full-time employees working 40 hours a week receive any benefits. There is only one employee at Hartford Square North working that number of hours. At the time the original employee complement was hired for Hartford Square North, Bourbeau was not aware of the union pay scale in Hartford.

GFS began providing cleaning services at Hartford Square West on June 1, assigning two to three employees to that building on a regular basis. The cleaning services provided at Hartford Square North are fundamentally the same as those provided by Capitol Cleaning. Specifically, Capitol Cleaning's work consisted generally of dusting, vacuuming, emptying trash, cleaning restrooms, and cleaning both tenant and public areas. The more detailed specifications of that work are set forth in Capitol's cleaning contract with Koll. Bourbeau was supplied by CP with the cleaning requirements that, at the time of her takeover, existed in the leases between the building management and the tenants, and which to her knowledge predated March 31. She was expected to include those services in her cleaning. Those tenant lease documents are duplicates of those included as part of Capitol Cleaning's contract with Koll, except that the day matron specifications do not appear in Bourbeau's tenant documents. Bourbeau employed only a day porter, not a day matron. After the takeover, GFS continued to provide all but a very small percentage of the services specified in those lease documents, with some adjustments in the frequency with which certain services were provided. In sum, like Capitol Cleaning, GFS's cleaning work consisted generally of dusting, vacuuming, emptying trash, cleaning restrooms, and cleaning both tenant and public areas of the building.

Capitol Cleaning utilized the janitors at Hartford Square North in the job classifications of light duty cleaner, heavy duty cleaners, day matron, and day porter. Those individuals assigned to the building worked primarily at that site. Other than two janitors working as day matron and day porter, the crew worked evenings. Similarly, GFS worked an evening cleaning crew, and day porter, though not a day matron. Capitol Cleaning's day porter worked on weekdays from 7 a.m. to 1 p.m,, whereas as least as of the summer under the effective GFS job description, its day porter worked either 6 a.m. to 3:30 p.m. or 7:30 a.m. to 4 p.m. Under Capitol Cleaning, workers' weekly hours ranged from 20 to 30, and under GFS, hours ranged from 15 to 30–40, with eight of the janitors working less than 20 hours per week.

In May, Bourbeau was made aware of a union petition signed by some of the Hartford Square North tenants. She testified that there were many tenant complaints during the first month of operation. These complaints subsided as time went by and the tenant's concerns were addressed. One of the persons complaining was Rose Hartford, office manager for E Entertainment, a tenant in Hartford Square North. Hartford testified that when Capital provided cleaning services, it assigned one cleaner, Lydia Colon, to their space. She considered this person to be excellent at her job. When GFS took over, there were problems and she complained frequently to Bourbeau. This was in late April or early May. In one of her conversations with Bourbeau, she mentioned how good Colon had been. Bourbeau told her that in her years of doing business, she had never hired union employees. Hartford offered to give Bourbeau Colon's phone number, but Bourbeau declined it saying that if Colon wanted to work for GFS, she should contact the Company. Bourbeau testified that when she received applications from the former employees in July, she looked for one that gave Rose Hartford as a reference, but could not find one. She testified that she had by this time forgotten the name given by Rose Hartford.

Hartford, along with a number of other tenants, signed a petition circulated by the Union. This petition reads:

> Dear CP Management: We the tenants of 10 Columbus Circle, request that you hire a contractor which will rehire the janitors that were fired on April 1, 1997. We find the position that CP Management has taken by firing the previous contractor and hiring a new contractor which replaced the 14 janitors abhorrent. We have known many of

[9] Though Bourbeau may had had to deal with company bills personally, there was no reason application forms could not have been sent out by a clerical employee when they were first requested.

[10] This method of hiring is Respondent's excuse for not interviewing or hiring any of the displaced Capitol Cleaning employees and will be discussed at length at a later point in this decision.

> the janitors personally. Some of them had been here for many years. Now, due to CP Management, they do not have jobs or benefits with which to support their families. Part of running a successful building is consistent service, such as cleaning and we are paying the same rent with inferior services. The quality of the new janitors is simply not up to par with the terminated janitors who we knew and trusted. We urge you to rehire a contractor who will rehire the old janitors.

At some point in May, GFS received the original charge in this case and secured labor counsel. Subsequently the Union attempted to organize GFS's Hartford employees and this effort was opposed by GFS. Inter alia, this opposition was expressed in a speech given to employees by Bourbeau. In the speech she makes it clear that she will do everything legal to keep the Union from organizing her employees. The Union has engaged in leafleting at the building protesting GFS's refusal to hire the displaced janitors and recognize the union.

E. Is Respondent the Successor to Capitol Cleaning and Obligated to Recognize and Bargain with the Union with Respect to its Hartford Employees?

In *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), the Supreme Court upheld the proposition that a mere change of employers or of ownership of an enterprise did not mean that the new employer had no obligation to bargain with its predecessor's employees. In the circumstances of that case, and where "the bargaining unit remained unchanged and a majority of employees hired by the new employer are represented by a recently certified bargaining agent," the Court found a duty to bargain on the part of the new employer. This doctrine was refined in *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 43–45 (1987), with the Court's holding "that a successor's obligation to bargain is not limited to a situation where the union in question has been recently elected. Where . . . the union has a rebuttable presumption of majority status, this status continues despite the change in employers and the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by the predecessor." (Footnote omitted.)

In *Fall River Dyeing,* supra, the Court went on to discuss the appropriate approach to determining whether an acquiring company is in fact a successor to the old company. More specifically, where an 8(a)(5) violation is alleged in the context of one employer assuming the operations of a predecessor employer, the General Counsel must demonstrate both the majority status or constructive majority status of the union in an appropriate unit, and a "substantial continuity" between the employing enterprises. As stated by the Board in another case involving the takeover of a cleaning operation,

> "The threshold test developed by the Board and approved by the Supreme Court in *Burns* and *Fall River Dyeing* for determining successorship is: (1) whether the majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer." (Footnoted citations omitted.) *Sierra Realty Corp.,* 317 NLRB 832 at 835.

The Court in *Fall River Dyeing*, supra, 482 U.S. at 41, focused on the following criteria in determining whether there exists the requisite "substantial continuity," namely:

> whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisor, and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.
>
> Since that case, the Board has had multiple instances to apply those standards in the cleaning and other service industries, as referred to below.

Continuity in the business enterprise exists in the instant case where the Respondent is providing the same cleaning business provided by the predecessor, at the same location and without any hiatus or 308 NLRB 310 (1992) (successorship found where respondent performed the same cleaning work at same location with same basic work schedule and job classification, and no hiatus between cleaning contractors); *Sierra Realty,* supra (successorship found where building management company assumed the cleaning operation previously performed in its building by a cleaning contractor). More specifically, Respondent's cleaning operation at the time it began cleaning on March 31 encompassed the same square footage in the same building, the same tenants and essentially the same cleaning services that were previously provided by Capitol Cleaning, namely dusting, vacuuming, emptying trash, cleaning restrooms, and cleaning both tenant and public areas, all subject to the same tenant lease requirements under which Capitol Cleaning operated. There is no evidence that Respondent effectuated any significant change in the character of the cleaning services provided at Hartford Square North. Rather, Respondent's evidence only identified minimal changes, such as variations in the frequency of delivery of certain services, the transfer of the task of changing light bulbs away from Respondent, and some changes in the chemicals used. Such minimal changes in operation methods do not undercut the continuity in business operations which is a component of successorship. See *Systems Management,* 292 NLRB 1075 (1989). Further, that continuity is not negated by the type of posttakeover tenant expansion and relocation noted in the record.

Moreover, in discussing *Fall River Dyeing,* supra, the Board has stated, "[T]he Court made it clear in that case that the factors it set out for determining whether a new employer has continued the same service operations as the predecessor are to be assessed primarily from the perspective of the employees. Thus, the question is whether those employees who have been retained will . . . view their job situations as essentially unaltered." *Sierra Realty,* supra at 835. In *Fall River Dyeing,* the Court expressly noted the particular significance of the fact that, from the perspective of the employees, their jobs did not change. Similarly, here employees' job functions are "essentially unaltered"—the janitors are still performing basic cleaning tasks. See *Planned Building Services,* 318 NLRB 1049 (1995) (acquiring building maintenance company found to be a successor).

An argument to the effect that continuity of the business enterprises cannot exist because Respondent did not purchase any tangible assets of the predecessor cleaning contractor, must fail. In *Burns,* supra, the seminal case, a guard service took over an operation without purchasing its predecessor's assets, and it was found by the Supreme Court to be a successor (see also *Sierra Realty,* supra at fn. 16, expressly rejecting the significance of the absence of purchased assets). Further, the Board

has found a successor bargaining obligation in numerous cases involving cleaning contractors where there apparently were no such purchases. *Laro Maintenance Corp.,* 312 NLRB 155 (1993); *Systems Management,* supra; *Weco Cleaning Services,* supra.

Neither is "continuity" destroyed or successorship defeated here because Respondent did not hire Capitol Cleaning's supervisor. See *Sierra Realty,* supra at 835, citing *Boston-Needham Industrial Cleaning Co.,* 216 NLRB 26, 27 (1975) (where "other factors indicate that essentially the same operation has been continued" the fact that there may not be a "substantial continuity in employment of the predecessor's supervisory staff," is not "of overriding importance").

Further, while other Board cases may enumerate more individual factors contributing to a finding of successorship than found here, and regardless of changes in the management company and building owner in this case, the most significant factors demonstrate continuity, namely it is fundamentally the same cleaning services which are provided in the same building for the same ultimate customers, and the employees would view their jobs as essentially the same.

Turning to the issue of the Union's majority status, that majority status will be established if a finding of discrimination is made with respect to the hiring practices for Respondent's initial startup operations on March 31. First it is clear that the collective-bargaining unit is the unit of the building service employees employed by Respondent at Hartford Square North. A single location bargaining unit is preemptively appropriate. *Sierra Realty,* supra at 836; *NLRB v. Boston Needham Industrial Cleaning Co.,* 528 F.2d 74 (1st Cir. 1975). At the time Respondent began operations on March 31, Hartford Square North was its only Hartford area operation. Respondent did not begin cleaning Hartford Square West until June 1. Accordingly, Respondent's duty to bargain is to be determined as of March 31, 1997, in the appropriate unit at that time.

Second, turning to the issue of majority status with the above described unit, "[i]t is now well settled that where, as here, an employer is found to have engaged in a discriminatory refusal to hire its predecessor's employees, the Board infers that all the former employees would have been retained, absent the unlawful discrimination." *Love's Barbeque Restaurant No. 62,* 245 NLRB 78, 82 (1979); *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Under such circumstances the Board presumes that the union's majority status would have continued. *State Distributing Co.,* 292 NLRB 1048 (1987). Concerning the inference that former employees would have been retained, also see *New Breed Leasing Corp. v. NLRB,* 317 NLRB 1011, 1025 (1995); *American Press, Inc. v. NLRB,* 833 F.2d 621, 626 (6th Cir. 1986); and *Shortway Suburban Lines,* 286 NLRB 323 (1987).

Thus, since Respondent meets the "continuity of the employing enterprise" under *Fall River Dyeing,* supra, and the Union would have continued to enjoy majority status but for the discrimination in hiring, Respondent is a *Burns* successor if it in fact discriminated in the hiring process. If that is shown, Respondent would also have violated Section 8(a)(5) by refusing to recognize and bargain with the Union. Moreover, if it discriminated in the hiring process, GFS's admitted unilaterally implemented changes in wages and benefits would be unlawful. *Burns,* supra; *Kallman v. NLRB,* supra; *Shortway Suburban Lines, Inc.,* supra.

F. Did Respondent Discriminate in its Initial and Subsequent Hiring in Hartford?

Section 8(a)(3) of the Act bars employment discrimination based on antiunion motivation. Where a violation of Section 8(a)(3) is alleged, the General Counsel bears the burden of proving by a preponderance of the evidence that an employee's union membership, activities, or other protected concerted conduct was a substantial motivating factor in an employer's adverse action against that employee. This proof, which normally includes proof of union animus, and adverse action against the alleged discriminatee, constitutes the General Counsel's prima facie case. Once the General Counsel has made a prima facie case that an employee's protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line,* 251 NLRB 1083 (1980).

Although a successor employer is not obligated to hire its predecessor' employees, the successor may not refuse or fail to hire predecessor employees because of their union membership or in order to avoid the obligations of a successor employer under *NLRB v. Burns Security Services,* 406 U.S. 272 (1972). In *U.S. Marine,* 293 NLRB 669, 670 (1989), the Board summarized the factors that will establish that a successor violated Section 8(a)(3) by refusing to hire the employees of a predecessor:

> substantial evidence of union animus, lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine [citations omitted].

The Union was the exclusive bargaining agent for the janitors at Hartford Square North since about 1991. Respondent was aware of this at least by mid-January, when Bourbeau was informed of this fact by Jacobs during her tour of the building. Jacobs also warned her that the Union would take steps to get back into the building if she did not use union labor. Accordingly, Respondent had knowledge of union activities of the predecessor employees, an ingredient of a prima facie case.

Substantial evidence of union animus is found in the admission of Bourbeau on March 31, that she "knew the building management didn't want a union in that building, and that if they were union, they would lose the job just like the old contractor did." It is also found in Bourbeau's statement on April 1 that if she had to pay the union rates, she would lose the job, that she would be thrown out of the building, that the management company wanted to keep costs down, and that the Union rates were beyond what she would pay." Comments about keeping labor costs down are fundamentally statements of antiunion animus. Where a refusal to hire is motivated by a desire to avoid paying union wage scale, that refusal constitutes unlawful discrimination under the Act. *Sierra Realty Corp.,* 317 NLRB 832, 835 (1995); *NLRB v. C.J.R. Transfer, Inc.,* 936 F.2d 279, 283 (6th Cir. 1991). Not only do Bourbeau's comments include references to the costs of unionization, but she admits that Respondent's employee-related costs would be higher under the union contract than under Respondent's current terms. The animus is even more evident in Bourbeau's

June speech to her incumbent employees, in which she expressly stated that she was opposed to having a union there and did not want it.

The General Counsel submits that Respondent's hiring practices for the initial hiring crew in Hartford reflect its antiunion animus. Antiunion motivation can be inferred from the character of the hiring practices of a business assuming an operation. See *Daka, Inc.,* 310 NLRB 201(1993); *Houston Distribution Services,* 227 NLRB 960, 966 (1977). Specifically, the General Counsel points out that Respondent's ads were "blind" as to the location of the building involved and interviews were held off site. See *New Breed Leasing,* 317 NLRB 1011 (1965) (blind ads and off-site interviews were among the factors relied on in drawing inference of animus). See also *Shortway Suburban Lines,* 286 NLRB 323, 328 (1987) ("long distance" hiring practices among factors relied on) and *Systems Management* (blind ads combined with fact that predecessor's employees were not notified of job loss until after new employees were hired suggesting prima facie case of discrimination). The General Counsel also cites *Systems Management,* supra, and *Daka, Inc.,* supra, for the point that the successor disregarded predecessors employees' applications and selected individuals for hire who did not meet the successor's qualifications, or decided to screen out, without interview, predecessor employees who met the successor's qualifications. The Board in these cases found that there was an object by the successor to avoid hiring a majority of the predecessor employees as revealed by the successor going to great lengths to avoid considering the predecessor employees as a pool of experienced workers.

I do not find that the factors relied on in the cases cited have been established here. Bourbeau credibly testified that she does not hire the employees of a predecessor employer except in the circumstances where the company offering the cleaning contract requires it. In this regard there are only two or three instances in the Company's 30-year history where this occurred. Thus, regardless of Respondent's antiunion animus, it followed a long-standing policy here, one which did not originate from animus. Second Respondent put in unrebutted evidence that ads for new employees in the cleaning industry are blind as to the location of the building to be cleaned. A number of ads for other cleaning contractors from the same newspaper used by Respondent to hire employees in Hartford are similarly blind. Bourbeau testified without contradiction that anyone responding to the ads was told the location for which employees were being hired, further weakening any argument that Respondent was trying to hide this information. Third, Respondent offered a rational reason for interviewing off site, across the street at Hartford Square West. Its building manager, CP, made furnished and insured space available to it at no cost. If anyone was hiding the ball about the upcoming changeover to GFS from Capitol Cleaning to GFS, it was Koll and its employee Jacobs. He knew the identity of the new contractor as early as January when he gave Bourbeau the tour of Hartford Square North. He knew then GFS was a nonunion contractor. At any time thereafter, he could have told Symolon or Brown that the contract was likely to be given to GFS. Instead, he waited to the end of February to tell Symolon that he was likely being replaced by a nonunion contractor and Symolon waited a week to tell Brown that he might be replaced, failing to impart the information that that contractor was nonunion. Symolon never told the affected employees that they were losing their jobs until it was a fact. Telling them of the upcoming change in contractors would have gotten the information to the Union before any job interviews were held. Though Symolon testified that he was relying on misleading inferences given him by CP's Marty Schwager, this was clearly wishful thinking in light of the clear written notice given him February 27 from Wilkinson that his contract was being terminated and Jacobs warning that he was being replaced by a nonunion company.

Though the General Counsel is correct in asserting that the predecessor employees here involved were experienced and would meet the qualifications needed by Respondent, there is no corresponding showing that the employees hired by respondent were not likewise experienced and met those qualifications. In conclusion, Respondent has offered rational, non animus motivated reasons for the manner in which it conducted its original hiring in Hartford and I find that it did not violate the Act in this regard as alleged in the complaint.

There remains however, a question with respect to the legality of Respondent's actions after March 31, when it first delayed the filing of applications by the predecessor employees and then refused to consider them when they were filed in July. In its defense, Respondent points to its long-standing employment practices. GFS has been in business for about thirty years. The Company attempts to maintain a family atmosphere, a philosophy it started with. The founder of the Company would clean using family members and friends to help. With some exceptions it hires only from referrals from its existing employees.[11] In the last 2 years, it has had to vary on occasion from the internal referral hiring system because the labor market in New Hampshire has been tight. It has for some time maintained an advertising piece it gives to prospective customers. Inter alia, it describes the Company's hiring practice thusly:

> The recruitment of GFS employees, a full time work force, is done 100% through internal referrals and recommendations, creating the atmosphere of an extended family, and reinforcing a structure based on team effort. In addition, the GFS turnover rate is less than 2% annually, far below the industry average.

With two exceptions, GFS has never hired the employees of another cleaning company when it has taken a cleaning contract. On two occasions, the party offering the contract to GFS made it a requirement that GFS give a preference to what were in house janitors. In one of these cases, GFS offered to interview about 44 previously in-house janitors. Four of these persons showed up for interviews and they were offered jobs. None accepted. In the other case, the contractor required that one in-house day porter be retained and the person was hired by GFS.

Except in the limited instances when forced to do so by the entity with which it was contracting, GFS departed from its internal referral hiring practice for the first time in 1996 when it placed an ad in the "Manchester Union Leader." It departed from this practice three times in 1997. The first was its hiring of employees in Hartford. The second was an ad for job applicants placed in the "National Broadcaster" in June and the third was an ad placed in a local New Hampshire paper in 1997. The reasons for the departure in the case of Hartford has already been discussed. The other two departures from using internal

[11] The Company employs a bonus system to reward employees who refer new employees who become permanent.

referrals were caused by an inability of the internal referral system to produce new employees.

Though I find that the General Counsel has made a prima facie case under a *Wright Line* analysis, I find that Respondent has credibly demonstrated that it would have followed the same hiring practices in Hartford even in the event the Union was not involved. Bourbeau credibly testified that she does not hire the employees of cleaning contractors she replaces and credibly testified that Respondent follows its internal referral system if at all possible. This system, as noted above has been used since the inception of GFS some 30 years ago. The Company has never departed from its usage except when directed to do so, as in the hiring of the initial complement of workers in Hartford, or when internal referrals did not meet is hiring needs. This system of hiring was clearly not implemented by the Company to avoid a union. That it has that effect currently in Hartford does not seem to me to make it unlawful. Bourbeau testified that she would consider the predecessor employees for hiring if she could not meet her needs through the internal referral system. Thus far, she has been able to hire all the employees she needs through internal referral. I do not believe that all the factors set out in *U. S. Marine,* supra, have been established. Though GFS clearly harbors animus, I believe it has shown that it would have conducted its hiring in the same manner absent any union activity on the part of the predecessor employees. It has never hired predecessor employees when it took over a contract, except when directed to do so by its principal. It has never been shown to have voluntarily abandoned its internal referral system. Thus its hiring practices in Hartford are not inconsistent with its past practice which has existed in a union free environment.[12]

On the other hand, there was no credible explanation offered for the delay in supplying the Union or the former employees of Capitol Cleaning with job applications. I find that this was clearly caused by Respondent's animus and was unlawful. *Weco Cleaning Specialists,* supra.

CONCLUSIONS OF LAW

l. GFS Building Maintenance, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by its delay in supplying the Union and its members with job applications for the employees displaced by Respondent's takeover of the cleaning contract at Hartford Square North.

4. Respondent did not commit other unfair labor practices.

REMEDY

Having found Respondent has engaged in conduct in violation of the Act, it is ordered to cease and desist therefrom and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, GFS Building Maintenance, Inc., Nashua, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Delaying supplying job applications to the Union or its members.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its office in Hartford, Connecticut, and mail to the Union's office copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 31, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

[12] It appears to me that to find Respondent's internal referral system to be unlawful or to find that it cannot rely on the system because it has the effect of making it difficult for the Union to get members hired by Respondent to be a policy determination for the Board. As I have found that Respondent's hiring actions are consistent with its past practice in a nonunion environment, I do not believe I can find them unlawful under existing case law.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT delay or fail to supply the Union or its members with job applications upon request.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

GFS BUILDING MAINTENANCE, INC.